Supreme Court, U.S.
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No. 94-225

In The

Supreme Court of the United States

October Term, 1994

WVCH, COMMUNICATIONS INC.; THOMAS H. MOFFIT and ALICE E. MOFFIT,

Petitioners,

vs.

UPPER PROVIDENCE TOWNSHIP, UPPER PROVIDENCE TOWNSHIP ZONING HEARING BOARD, RHONE-POULENC RORER PHARMACEUTICAL, INC.; STERLING RESEARCH GROUP and SUE TIEFENTHALER,

Respondents,

-and-

WALTER KALIL, CLAY HESS, Individually; KALIL PRINTING, INC. and THE SCHOOL BOARD OF THE SPRING FORD SCHOOL DISTRICT,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENT THE SCHOOL BOARD OF THE SPRING FORD SCHOOL DISTRICT

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QUESTIONS PRESENTED

1. Does a litigant set forth a substantive due process claim based upon alleged procedural infirmities of a Zoning Hearing Board when review of a Zoning Hearing Board decision is currently pending in state court?

2. Is a Zoning Hearing Board pre-empted by Federal law from considering the extent to which local residents could be harmed by the electromagnetic radio waves emanating from a litigant's proposed radio tower?

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The Respondent, Spring Ford School District, by and through its attorneys, Frederick C. Horn, Esquire, for Pearlstine/Salkin Associates, respectfully requests that the Writ of Certiorari requested by Petitioners be denied.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on May 4, 1994. The Order of the United States Court of Appeals for the Third Circuit denying Petitioners' request for rehearing was entered on June 1, 1994. The jurisdiction of the Supreme Court is allegedly based upon Rule 10 of the Supreme Court Rules providing for judicial discretion with regard to a review on Writ of Certiorari. Nonetheless, it is respectfully submitted that the present case does not present an important question of Federal law which has not been settled by this Court nor does it involve a Federal question in a way that conflicts with the applicable decisions of this Court. The decision of the Court below conforms with the law as handed down by this Court as well as the law in existence throughout the various circuits in the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution and the First Amendment to the United States Constitution are asserted as the Constitutional provisions involved in the Petition for Writ of Certiorari. Respondent asserts there is no substantive due process right to a speedy zoning hearing free from alleged improper evidentiary rulings.

The Abstention Doctrine is applicable as the facts of the present case clearly show that a resolution by State Court of the allegedly unsettled State Law issues would make consideration of the Federal Constitutional issues unnecessary.

STATEMENT OF THE CASE

The Petitioners purchased property in Upper Providence Township, Montgomery County, Pennsylvania and, at the time they purchased it, the Petitioners knew it was not properly zoned for the purpose of an AM radio station. Thereafter, the Petitioners sought to alter the existing Ordinance in proceedings for a curative amendment which, in effect, challenged the validity of the Zoning Ordinance. Opposition to the Petitioners' challenge came from private citizens, individuals living in the community and surrounding area, as well as the Defendant corporations. The Spring Ford School District intervened in the proceedings for the purpose of presenting one witness to testify on the effects of electromagnetic radiation which encompasses radio waves broadcast by an AM/FM radio transmitter. The series of hearings allowed for the presentation of expert evidence and rebuttal evidence which took from September 1989 to August 1992 in order to bring the matter to a conclusion. The adverse decision of the Zoning Hearing Board was then appealed by the Petitioners/ Appellants, WVCH *et al.*, to the Court of Common Pleas of Montgomery County, a State Court, where the matter is pending.

The action in Federal Court was commenced by the Petitioners, WVCH, filing two separate Complaints which were brought pursuant to 14 U.S.C. § 1983, alleging a Title 1983 cause of action arising out of the Zoning Hearing Board proceedings in Upper Providence Township. The United States District Court for the Eastern District of Pennsylvania granted the Respondents' Motion to Dismiss for failure of the Petitioners to state any viable causes of action. After the Order was entered in the lower court dismissing the Petitioners' Complaint, it was appealed to the United States Court of Appeals for the Third Circuit where the decision was affirmed. This Petition for a Writ of Certiorari follows the adverse decisions in the United States Court of Appeals for the Third Circuit.

It is of great significance that, during the Zoning Hearing Process, Petitioners, WVCH *et al.*, did not take any legal action to shorten the process as it is apparent from the record and a review of the pleadings filed that the time consumed at the hearings was in fact, directly caused by the Petitioners, who continued to present witnesses over a two-year period.

It is also significant that the Petitioners chose a 44-acre parcel in the Township that was zoned residential to locate their AM radio station. This fact alone generated wide-spread opposition among the local residents that believed they would be adversely affected and hence opposed the granting of curative amendment. The residential classification in Upper Providence Township (R-1) permits a number of agricultural and residential uses, but does not allow commercial or industrial uses, a fact well known to the Petitioners before any of the proceedings were initiated. As a result, the Petitioners mounted a massive challenge to the Zoning Ordinance with extensive hearings and voluminous record and only after they were unsuccessful did the Petitioners complain about a violation of their due process rights in a blatant attempt to utilize the Federal Courts to circumvent local zoning and in effect have the Federal Courts sit as a super zoning board.

The Respondent, Spring Ford School District, never took any action under color of State law, but nonetheless was named a Defendant in a Title 1983 Civil Rights action. The only action or activity undertaken by the Spring Ford School District was to present one expert witness whose testimony was not even questioned on cross-examination by counsel for Petitioners. The Petitioners in their Complaints did not allege that the Respondent, Spring Ford School District, itself delayed the hearing process at all. In fact, after the presentation of its witnesses, the Spring Ford School District requested that it not be required to be involved in the rest of the proceedings and the Petitioners refused to consent to the request of the District to terminate its involvement hearings.

While the Petitioners did allege that some Respondents had an economic or political incentive to act in the fashion that they did, the Petitioners never alleged nor could they allege that there was any economic or political reason for the Spring Ford School District to take the actions that it took. The School Board's action only served to protect the general welfare of the inhabitants of the School District and the children attending the public school. The public school in question was geographically located within approximately one-half to one mile from the proposed AM radio tower which the Petitioners sought to construct.

SUMMARY OF ARGUMENT

The lower court, which was affirmed by the Court of Appeals, correctly held that the Petitioners failed to state a § 1983 claim on substantive due process grounds. In order to set forth a § 1983 claim, there must be sufficient allegations to support a determination that (i) the conduct complained of has been committed under color of State law, and (ii) the alleged conduct worked a denial of rights secured by the Constitution or laws of the United States. In the present case, while the conduct complained of has arguably been committed under the color of State law, the Respondent School Board of the Spring Ford School District took no action under color of State law. The School District acted as an individual party and presented one witness at a zoning hearing. In addition, the Petitioners have alleged no rights or entitlements under State law which would support a substantive due process denial of rights secured by the Constitution or laws of the United States.

It is clear that the Petitioners have no Constitutional or State provided right to construct a radio station on their land wherever they choose and no such right is even alleged. There is no question but that the licensing of the airways is within the purview of the Federal Communications Commission but that, by itself, does not

mean that one can construct a radio tower anywhere one chooses without regard to local land use, zoning and general welfare considerations.

The test of substantive due process asks whether or not there is a rational relation between the State action and a legitimate government interest. Testimony regarding radio wave (electromagnetic radiation) potential damage is most certainly rationally related to the health, safety and welfare interests of local government and, as such, is quite proper.

The Petitioners base their right to proceed in Federal Court on allegations of various Constitutional violations. Nonetheless, in order to prevail on a § 1983 claim, the action taken against the Petitioners must be under color of State law. In the present case, the District was acting as an individual and not as a State actor and, as such, the District cannot be liable for the Petitioners' Constitutionally based claims. Under the facts alleged in the Petitioners' Complaint, it is clear that the School District was certainly not involved in any conspiracy, and no facts have been alleged which, even if believed, could support such a conspiracy action. There have been no allegations of any plots, plans or agreements between the District and other parties and without proper allegations of conspiracy, as ludicrous as they may be, the District cannot be and indeed is not liable to the Petitioners for any Constitutionally based claims.

Lastly, pursuant to the Abstention Doctrine, the Petitioners' actions are premature. Whether or not the Petitioners had in fact been deprived of a protected State Property Interest must await the outcome of their State Court appeal from the determination of the Zoning Hearing Board. Absent such a determination, the Petitioners have no right or entitlement which has been taken away from them and no cause of action for a substantive due process violation.

REASONS FOR DENYING THE WRIT

I.

THE LOWER COURT CORRECTLY CONCLUDED THAT THE PETITIONERS FAILED TO SET FORTH A CAUSE OF ACTION FOR ANY ALLEGED VIOLATION OF THE PETITIONERS' SUBSTANTIVE DUE PROCESS RIGHTS.

In order to set forth a cause of action under Title 1983, a claim must allege facts sufficient to support a determination that the conduct complained of has been committed under State law and, second, that the alleged conduct worked a denial of rights secured by the Constitution or the laws of the United States. In the present case, the Petitioners are not contending that the denial by the Zoning Hearing Board of their request to construct a radio tower is relevant to a claim for denial of substantive due process. What Petitioners apparently contend is that certain adverse evidentiary rulings amounted to a denial of due process. No court has ever recognized such a premise.

It is essential for the Petitioner to establish a property right or entitlement under State law and, in default thereof, the due process clause will not afford an additional remedy to one alleging a violation. *Board of Regents v. Roth,* 408 U.S. 564, 576, 92 S. Ct. 2701, 2708 (1972). In addition, the Fourteenth Amendment Due Process Protection of Property applies only to interests a person has already acquired in specific benefits. *Board of Regents v. Roth,* 408 U.S. at 576.

Petitioners allege that they have had their rights to substantive due process of law violated, but fail to allege an *existing* property interest as a matter of right. The Supreme Court has stated, in *Board of Regents v. Roth, supra,* the following:

> Property interests, of course, are not created by the Constitution. Rather, they are created, and their dimensions are defined by the existing rules of understandings that stem from an independent source such as State law.

In the case at bar, it is not contended that the land was ever zoned to allow the use that Petitioners seek to make of the land to wit: construction of an AM broadcast facility with a tower array. At best, the Petitioners have a possibility of an interest or benefit. In order to have a property interest in a benefit, a person must have more than a unilateral expectation, the person must, instead, have a legitimate claim of entitlement to it. *Roth,* at 408 U.S. 577.

This Court, in the cases of *Parratt v. Taylor,* 451 U.S. 527, 101 S. Ct. 1908 (1981), and *Hudson v. Palmer,* 468 U.S. 517, 104 S. Ct. 3194 (1984), established that the due process clause of the Fourteenth Amendment is not violated when a State employee either negligently or intentionally deprives an individual of property, provided that the State makes available a meaningful post-deprivation remedy. *The Petitioners in this case have a meaningful post-deprivation remedy as provided by the State Court and are in fact pursuing that remedy.*

Furthermore, the Abstention Doctrine, as espoused in the case of *Railroad Commission of Texas v. Pullman Co.,* 312 U.S. 496, 61 S. Ct. 643 (1941) would apply where the resolution by State law of an unsettled issue of State law would make consideration of the Federal Constitutional issue unnecessary or change the light in which it must be viewed. This Doctrine has been reaffirmed numerous times and is well accepted law throughout the nation. As such, it is clear that, under the *Parratt/Hudson* decisions and under the Abstention Doctrine, there is no due process remedy available under the facts alleged in this case.

It must be remembered that for the Petitioners to prevail, the law in the United States, as previously espoused by the Supreme Court, would have to be so modified as to allow proceedings to go forth in Federal Court where there was an allegation of a substantive due process violation with no identifiable property interest notwithstanding the existence and availability of a State remedial process. This would require a significant change in the law of the United States with regard to the requirements and criteria for substantive due process violations a well as an abandonment of the Abstention Doctrine. Undoubtedly, this would result in the Federal Courts becoming super zoning boards where every disgruntled individual will file a complaint as soon as they do not get the relief that they request in another forum on an immediate basis.

The present case involves nothing more than a disgruntled litigant who lost his case at a Zoning Hearing Board level, appealed it to a trial court, where it is presently pending, and seeks to, on the basis of allegations of substantive due process violations, unsupported by any property interest, have the Federal Courts review the entire matter and grant him the relief requested. If this is permitted, it is respectfully suggested that there would be no purpose in conducting proceedings before Zoning Hearing Boards or State courts because the mere allegation of a due process violation would be sufficient to cause the matter to be removed, transferred or otherwise allow it to proceed in Federal Court. This would result in lower court decisions in the State court system being nothing more than advisory. It is respectfully suggested that this would constitute an unwarranted extension of Federalism into matters of purely local interest such as zoning hearings and the like.

The absence of a property interest recognized at law is fatal to the Petitioners' case. The operation of a radio station is not and has never been a right recognized by State law, or a right guaranteed by

the United States Constitution. For instance, reputation was not a property interest in the case of *Paul v. Davis,* 424 U.S. 693, 700, 96 S. Ct. 1155 (1976):

> Respondent, however, has pointed to no specific constitutional guarantee safeguarding the interest he asserts has been invaded. Rather, he believes that the Fourteenth Amendment due process clause should *ex proprio vigore* extend to him the right to be free of injury whenever the state may be characterized as a tortfeasor. But such a remedy would make the Fourteenth Amendment a font of tort law to be superimposed upon whatever system may already been administered by the state.

The sole state property interest upon which the Petitioners have based their lawsuit is the alleged right to have the zoning ordinance of Upper Providence Township declared unconstitutional and to be allowed as a result to establish a radio station on their property where they cannot now legally do so. This is clearly not a property interest, much less a protected property interest. As such, any reference to alleged conspiracies with regard to such interest and allegations of incorrect evidentiary rulings must fail. No court has ever suggested that such infirmities, even if present, support a substantive due process violation as there is no underlying property interest.

Finally, in the present case, there is no averment whatsoever that the Spring Ford School District was acting under the color of State law in participating in the Zoning Hearing Board proceedings. The only averment which would feasibly bring the District under the umbrella of the Complaint filed by Petitioners is the broad allegations that the "Defendants" acted together to deprive the Petitioners of their due process rights. There have been

no allegations whatsoever, regarding an underlying plot, plan, or intent to form a conspiracy between the School Board of the Spring Ford School District and the other Respondents and these omissions are fatal to the Constitutional causes of action alleged by the Petitioners.

II.

THE FCC, BY THE GRANTING OF AN AM BROADCAST LICENSE, DID NOT CONFER ANY AUTHORITY OR RIGHT TO CONSTRUCT A RADIO STATION AT ANY LOCATION A LICENSEE MAY SO CHOOSE, BUT RATHER STATED THE FREQUENCY AND AREA TO BE SERVICED BY SAID LICENSE.

The issue of FCC pre-emption of local zoning ordinances has been decided against federal pre-emption. The most significant case in the Third Circuit addressing this issue is *Kroeger v. Stahl,* 248 F.2d 121 (3d Cir. 1957), which involved a challenge to a municipal zoning ordinance on a claim of pre-emption. The ordinance prohibited a radio station owner from erecting a 75-foot tower. The facility was licensed by the FCC and had temporary authorization to conduct ratio tests. The court dealt with the pre-emption issue and stated the following at page 123:

> As to whether or not the ordinance is inconsistent with powers delegated by Congress to the Federal Communications Commission . . . the following quotations set forth in the opinion of the District Court are appropriate: . . . The principle is generally established that the exercise by the state of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so

> "direct and positive" that the two acts cannot "be reconciled" where consistently stated together.

In the *Kroeger* case, the court went on to state that an ordinance is acceptable when it is reconcilable with the provisions of the FCC Act of 1934 as amended pertaining to the regulation of radio broadcasting. *Id.* at 123. As the Upper Providence Township Zoning Ordinance does not conflict with the FCC Act, there is no pre-emption problem.

In order for the Petitioner to prevail, the law would have to be so construed as to allow the holder of an FCC license to construct a facility any place that he wanted to regardless of the impact upon the local area. This would be a result not envisioned by the FCC merely by the granting of broadcast licenses.

Petitioner has not overcome the presumption of validity of the Zoning Ordinance allowing the municipality to restrict the use of property in certain zones, nor has the Petitioner established such irreparable injury as to constitute a deprivation of property or a clearly arbitrary or unreasonable restriction as to the use of his property. The decision by the Zoning Hearing Board to hear testimony regarding radio wave (electromagnetic) damage is well within its proper exercise of police power. Petitioner's allegations do not set forth claims for a denial of substantive due process under the Constitution and laws of the United States.

CONCLUSION

The opinion of the Court of Appeals of the Third Circuit in affirming the lower court decision that there was no violation of the due process clause of the Fourteenth Amendment was decided on well-settled principles of constitutional law. There is no need for FCC pre-emption of local zoning laws with regard to the actual physical location of AM radio stations and the construction of towers. The Petitioners have not alleged any property right entitling them to maintain a claim for violation of their substantive due process rights. Respondents therefore request that your Honorable not grant certiorari.

Respectfully submitted,

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